



# Immigration Law Advisor

July 2009 A Monthly Legal Publication of the Executive Office for Immigration Review Vol. 3 No.7

## In this issue...

Page 1: Feature Article:

*Moral Turpitude After Silva-Trevino*

Page 6: Federal Court Activity

Page 8: BIA Precedent Decisions

Page 10: Regulatory Update

The Immigration Law Advisor is a professional monthly newsletter of the Executive Office for Immigration Review ("EOIR") that is intended solely as an educational resource to disseminate information on developments in immigration law pertinent to the Immigration Courts and the Board of Immigration Appeals. Any views expressed are those of the authors and do not represent the positions of EOIR, the Department of Justice, the Attorney General, or the U.S. Government. This publication contains no legal advice and may not be construed to create or limit any rights enforceable by law. EOIR will not answer questions concerning the publication's content or how it may pertain to any individual case. Guidance concerning proceedings before EOIR may be found in the Immigration Court Practice Manual and/or the Board of Immigration Appeals Practice Manual.

## Moral Turpitude After Silva-Trevino

by Geoffrey Gilpin and Brad Hunter

The term "moral turpitude" was first incorporated into the immigration laws of the United States in the Immigration Act of March 3, 1891, 26 Stat. 1084.<sup>1</sup> Today, commission of a "crime involving moral turpitude" ("CIMT") may render an alien either inadmissible, removable from the United States, or ineligible for relief.<sup>2</sup> Although the Immigration and Nationality Act has dealt with the topic for over 100 years, what qualifies as a CIMT continues to be the source of considerable interest.

In *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008), former Attorney General Michael Mukasey set forth a new standard for determining whether a person has been convicted of a crime involving moral turpitude under the Immigration and Nationality Act. Three key changes or clarifications were made.

First, the new standard adopted a "realistic probability" test that looks at "whether there is a realistic probability, not a theoretical possibility, that the . . . statute pursuant to which the alien was convicted would be applied to reach conduct that does not involve moral turpitude." *Id.* at 690 (quotations omitted). This test limits the use of hypotheticals when considering conduct proscribed by a statute. Second, the Attorney General sought to clarify what constitutes a crime involving moral turpitude. Finally—in a significant departure from procedures previously employed by most circuits—the Attorney General authorized adjudicators to look beyond the record of conviction in making a CIMT determination.

The purpose of this article is first to examine the approach used in *Silva-Trevino* and the changes it introduces. Second, this article explores the most recent circuit precedent regarding CIMTs. Finally, it considers some of the reaction that has followed the opinion's release.

### The Case

The respondent in *Silva-Trevino* was a 64-year-old lawful permanent resident convicted of "indecency with a child" under the Texas Penal Code.<sup>3</sup>

The respondent conceded removability for conviction of an aggravated felony, but he sought to readjust his status to that of a lawful permanent resident through his wife. The Immigration Judge denied the respondent's application for adjustment of status on the basis that he was statutorily ineligible because his offense constituted a CIMT.

The respondent appealed to the Board of Immigration Appeals, arguing that not all conduct proscribed under the statute would necessarily involve moral turpitude. Applying the standard of the United States Court of Appeals for the Fifth Circuit that considers, as the Board noted, "the minimum circumstances possible for a conviction" and not the actual underlying conduct, the Board found that a range of possibilities not involving moral turpitude could result in criminal liability under the statute.<sup>4</sup> *Silva-Trevino*, 24 I&N Dec. at 692 (quoting from the Board's decision). Accordingly, the Board held that the respondent was not convicted of a CIMT and remanded the case to the Immigration Judge for adjudication of the respondent's request for discretionary relief.

Following the Board's decision, then-Attorney General Alberto Gonzales certified the case to himself for reconsideration.

### **Before *Silva-Trevino*: Categorical and Modified Categorical Analyses**

To date, most circuit courts have followed the categorical approach in analyzing a respondent's conviction to determine if it involves moral turpitude.<sup>5</sup> This approach, applied at the first level of examination, looks only to the statute to ascertain the necessary elements for a conviction. See *Silva-Trevino*, 24 I&N Dec. at 688. As the First Circuit summarizes, "The inherent nature of the crime of conviction, as defined in the criminal statute, is relevant in this determination; the particular circumstances of [a respondent's] acts and convictions are not." *Maghsoudi v. INS*, 181 F.3d 8, 14 (1st Cir. 1999).

In the case of a "divisible statute" that contains multiple subsections, some of which categorically involve moral turpitude and some of which do not, the "modified categorical" approach has traditionally been permitted. *Silva-Trevino*, 24 I&N Dec. at 688. This approach permits the adjudicator to refer to the record of conviction to ascertain under which section of a statute

a person was convicted.<sup>6</sup> See, e.g., *Wala v. Mukasey*, 511 F.3d 102, 107-08 (2d Cir. 2007). Documents that a court might consider from the record of conviction include "the charging document, a plea agreement, a verdict or judgment of conviction, a record of the sentence, or a plea colloquy transcript."<sup>7</sup> *Id.* at 108 (quoting *Dickson v. Ashcroft*, 346 F.3d 44, 53 (2d Cir. 2003)). The modified categorical approach has also been employed by the majority of circuits in the context of analyzing a crime involving moral turpitude.<sup>8</sup>

The Seventh Circuit stands in marked contrast to the other circuits. In *Ali v. Mukasey*, 521 F.3d 737 (7th Cir. 2008), *cert. denied*, \_\_\_ U.S. \_\_\_, 2009 WL 1738655 (June 22, 2009), the court held that the Immigration Judge should not be limited to the record of conviction in assessing whether a crime involves moral turpitude. The court concluded that Sixth Amendment and procedural limitations that govern the categorical approach in sentencing cases do not apply in the civil context of immigration proceedings. *Id.* at 741. Accordingly, the court stated, "[W]e now conclude that when deciding how to classify convictions . . . the agency has the discretion to consider evidence beyond the charging papers and judgment of conviction." *Id.* at 743. This decision is cited favorably several times in the Attorney General's decision. See *Silva-Trevino*, 24 I&N Dec. at 700-02.

### **The *Silva-Trevino* Three-Step Analysis**

In *Silva-Trevino*, the Attorney General set forth an analytical framework for determining where a crime involves moral turpitude. The analysis includes three steps:

1. First, Immigration Judges should apply the categorical approach to determine if moral turpitude "necessarily inheres" in the statute of conviction. Further, Immigration Judges at this stage should apply the "realistic probability" standard adopted by the Supreme Court in *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007), and discussed below. *Silva-Trevino*, 24 I&N Dec. at 688-90.
2. If the statute proscribes conduct that may or may not include moral turpitude, the Immigration Judge should look to the record of conviction under the modified categorical approach to ascertain whether the alien was convicted under

a statutory provision in which moral turpitude necessarily inheres. *Id.* at 690.

3. Finally, if “the record of conviction is inconclusive, judges may, to the extent they deem it necessary and appropriate, consider evidence beyond the formal record of conviction.” *Id.*

### What *Silva-Trevino* Changes

#### *Realistic Probability Test*

In *Silva-Trevino*, the Attorney General instructed Immigration Judges to employ the “realistic probability” test adopted by the Supreme Court in *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007).<sup>9</sup> In this respect, the Attorney General quoted the Supreme Court’s explanation in *Duenas-Alvarez*:

“[T]o find that a state statute creates a crime outside the generic definition of a listed crime in a federal statute requires more than the application of legal imagination to a state statute’s language. It requires a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime. . . . [H]e must at least point to his own case or other cases in which the state courts in fact did apply the statute in the special . . . manner for which he argues.”

*Silva-Trevino*, 24 I&N Dec. at 697 (quoting *Duenas-Alvarez*, 549 U.S. at 193).

The Attorney General stated that Immigration Judges should employ this test at the categorical level of statutory review to determine the likelihood that moral turpitude does *not* inhere in a particular statute. *Id.* at 698. The test is significant because it requires an alien to point to a case, and not merely a hypothetical,<sup>10</sup> where a person has been convicted under the statute in circumstances that do not involve moral turpitude.<sup>11</sup> An alien may present his or her own case as just such an example. *Id.* at 697.

The Board applied this test in *Matter of Louissaint*, 24 I&N Dec. 754 (BIA 2009), its first published decision addressing CIMTs after *Silva-Trevino*. Without

looking further than the statute of conviction, the Board determined that moral turpitude necessarily inheres in a Florida burglary statute. After analyzing the elements of the statute, the Board stated that “there is no ‘realistic probability’ that [the statute], which involves the unlawful entry into an occupied dwelling, would be applied to reach conduct that does not involve moral turpitude.” *Louissaint*, 24 I&N Dec. at 759. The Board noted that the respondent may file a motion to reopen if he is aware of any case—including his own—that resulted in conviction under the statute but did not involve turpitudinous conduct. *Id.* at 759 n.4.

#### *The Record of Conviction . . . And Beyond*

The final stage of inquiry permitted under the *Silva-Trevino* approach represents the most significant departure from existing law. As previously stated, the Attorney General authorized Immigration Judges to look beyond the record of conviction “to the extent they deem it necessary and appropriate.” *Id.* at 690. The Attorney General elaborated that “when the record of conviction fails to show whether the alien was convicted of a crime involving moral turpitude, immigration judges should be permitted to consider evidence beyond that record if doing so is necessary and appropriate to ensure proper application of the Act’s moral turpitude provisions.”<sup>12</sup> *Id.* at 699.

The Attorney General stated that “[t]o limit the information available to immigration judges in such cases means that they will be unable to determine whether an alien’s crime actually ‘involv[ed]’ moral turpitude.” *Id.* at 699. The goal is “to resolve accurately the moral turpitude question.” *Id.* at 704.

#### *Braving the “Amorphous Morass of Moral Turpitude”*<sup>13</sup>

The Attorney General also sought to clarify what constitutes a crime involving moral turpitude, a term that has been notoriously difficult to define.<sup>14</sup> The Board has previously referred to moral turpitude as “conduct that shocks the public conscience as being ‘inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general.’”<sup>15</sup> *Matter of Solon*, 24 I&N Dec. 239, 240 (BIA 2007) (quoting *Matter of Ajami*, 22 I&N Dec. 949, 959 (BIA 1999)); see also *Mendez v. Mukasey*, 547 F.3d 345, 347 (2d Cir. 2008).

In *Silva-Trevino*, the Attorney General added to this definition, stating that, “to qualify as a crime involving moral turpitude for purposes of the Act, a crime must involve both reprehensible conduct and some degree of scienter, whether specific intent, deliberateness, willfulness, or recklessness.”<sup>16</sup> *Silva-Trevino*, 24 I&N Dec. at 689 n.1.

The Board’s prior interpretation of this ambiguous term had been afforded deference by a number of circuits, but not uniformly so. Indeed, the Ninth Circuit has only recently joined the majority of circuits in according deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), to the Board’s interpretation. See *Marmolejo-Campos v. Holder*, 558 F.3d 903, 909-12 (9th Cir. 2009) (welcoming the Attorney General’s clarification as to the elements of a crime involving moral turpitude).

### **Toward A Uniform Approach**

In *Silva-Trevino*, the Attorney General sought to establish a uniform methodology of analysis that accurately identifies crimes involving moral turpitude in an administratively feasible fashion. *Silva-Trevino*, 24 I&N Dec. at 688. The Attorney General stated that providing an authoritative interpretation of this ambiguous provision is one of the key duties the Act gives to the Department of Justice. *Id.* at 695 (citing section 103(a)(1) of the Act, 8 U.S.C. § 1103(a)(1)). Also, greater clarity in the definition of what constitutes a crime involving moral turpitude will give aliens “clearer notice of which criminal convictions will trigger certain immigration consequences.” *Id.* at 689 n.1.

*Silva-Trevino* also set forth the rationale for departing from the limits previously cited by the Board in not looking beyond the record of conviction. *Id.* at 699-702. In particular, the Attorney General stated that Sixth Amendment constitutional concerns limiting the scope of inquiries in sentencing cases should not apply in immigration proceedings, because they are civil in nature. *Id.* at 700-01.

Additionally, the judicial determination of elements, central to classifying prior crimes in the sentencing area, cannot apply to convictions involving “moral turpitude,” which does not itself exist as an element in criminal offenses. *Id.* at 701-02. Also, the Attorney

General stated that concerns about the administrative burden of looking behind the record of conviction are those of the administering agency and Immigration Judges, not the judiciary. *Id.* at 702-03.

Regarding potential circuit court reaction to his decision, the Attorney General stated that under *National Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005), the new framework adopted by the agency should be afforded deference, even where circuits have previously established their own standards. *Silva-Trevino*, 24 I&N Dec. at 696.

### **Reaction**

Several organizations, including the American Immigration Lawyers Association, responded quickly to *Silva-Trevino*, filing an amici curiae brief (“AILA brief”) with the Attorney General, seeking reconsideration of the decision.<sup>17</sup> The group sought withdrawal of the opinion, and the brief listed a number of concerns ranging from the manner in which the Attorney General certified the decision to himself to the retroactive effect it may have on aliens with prior convictions.

The AILA brief focused in particular on the departure from precedent. The group argued that *Matter of Silva-Trevino* abandons precedent that stretches back approximately a century. See AILA Brief at 26 (citing *United States ex rel. Castro v. Williams*, 203 F. 155, 156-57 (D.C.N.Y. 1913)).

The brief also expressed concern that the opinion does not establish sufficient standards to address an examination that goes beyond the record of conviction. See AILA Brief at 39-44. A key issue raised was the potential lack of uniformity in the application of the new standard by Immigration Judges. *Id.* at 41 (“This necessity of uniformity . . . is a core reason for the application of the categorical and modified categorical approach . . .”).

Another concern noted in the brief was that by departing from the existing standard, *Silva-Trevino* may disrupt the orderly function of the criminal justice system, as defendants cannot predict with certainty the consequences of plea agreements. *Id.* at 44.

So far, only the Ninth Circuit has cited *Matter of Silva-Trevino*. In *Marmolejo-Campos*, 558 F.3d 903, the

Ninth Circuit found former Attorney General Mukasey’s modification of the definition of “moral turpitude” to be “a welcome effort to ‘establish a uniform framework’ for the determination of [CIMTs].” *Id.* at 910 (quoting *Silva-Trevino*, 24 I&N Dec. at 688). The court did not reach the third step of the *Silva-Trevino* framework. *Id.* at 907 n.6 (“As that question is not squarely before us, we reserve judgment as to the validity of that portion of our prior case law which suggests review should be more confined.”).

### Possible Questions of Law

Extending the inquiry beyond the record of conviction also raises questions of law for adjudicators, such as whether moral turpitude inheres in instances where respondents have had charges reduced or partially dismissed. To illustrate, an Immigration Judge conducting an inquiry beyond the record of conviction may find evidence that a respondent committed a more serious crime than that for which he or she was convicted. Turpitude may necessarily inhere in the former, but not the latter.

While the Federal rules of evidence do not apply in immigration proceedings, the Immigration Judge will still be asked to decide whether the admission of evidence from outside the record of conviction, offered to prove that a crime involves moral turpitude, is probative and fundamentally fair to the parties. *See, e.g., Espinoza v. INS*, 45 F.3d 308, 310 (9th Cir. 1995). Although a police report may be admissible in some instances, it has often been held not to be admissible in conducting the categorical approach.<sup>18</sup> The new framework in *Silva-Trevino* may well lead to further development in this area.

### Conclusion

*Matter of Silva-Trevino* significantly alters the approach for determining whether a crime involves moral turpitude. The framework modifies the categorical approach while greatly expanding the latitude an Immigration Judge has to look beyond the record of conviction. The decision aims to bring uniformity to this area of immigration law, but to date no circuits have addressed the full framework set forth in the case.

*Geoffrey Gilpin is the Attorney Advisor at the Kansas City, Missouri, Immigration Court. Brad Hunter is the Attorney Advisor at the Omaha, Nebraska, Immigration Court.*

1. *See Jordan v. DeGeorge*, 341 U.S. 223, 230 n.14 (1951) (discussing the history of crimes involving moral turpitude).
2. *See* sections 212(a)(2)(A)(i)(I), 237(a)(2)(A)(i)(I)-(II) of the Immigration and Nationality Act, 8 U.S.C. §§ 1182(a)(2)(A)(i)(I), 1227(a)(2)(A)(i)(I)-(II).
3. Tex. Penal Code § 21.11(a)(1) (Vernon 2004). Under this statute, it is illegal to “engage[] in sexual contact with [a] child or cause[] [a] child to engage in sexual contact,” if the child is “younger than 17 years and not the person’s spouse,” unless the person committing the act “was not more than three years older than the victim and of the opposite sex” and other conditions are present. *Id.* § 21.11(a)(1), (b)(1). “Sexual contact” is defined as “(1) any touching by a person, including touching through clothing, of the anus, breast, or any part of the genitals of a child; or (2) any touching of any part of the body of a child, including touching through clothing, with the anus, breast, or any part of the genitals of a person.” *Id.* § 21.11(c).
4. Analyzing the elements, the Board found that a 20-year-old woman with the intent to arouse herself or another could dance suggestively with a 16-year-old male and be convicted under the statute for touching the victim through his clothing. *Silva-Trevino*, 24 I&N Dec. at 692 (citing to the Board’s decision).
5. *See, e.g., Keunge v. U.S. Att’y Gen.*, 561 F.3d 1281, 1284 (11th Cir. 2009); *Marmolejo-Campos v. Holder*, 558 F.3d 903, 912 (9th Cir. 2009); *Wala v. Mukasey*, 511 F.3d 102, 107-08 (2d Cir. 2007); *Recio-Prado v. Gonzales*, 456 F.3d 819, 821 (8th Cir. 2006); *Partyka v. Att’y Gen. of the U.S.*, 417 F.3d 408, 411-12 (3d Cir. 2005); *Smalley v. Ashcroft*, 354 F.3d 332, 336 (5th Cir. 2003); *Yousefi v. U.S. INS*, 260 F.3d 318, 326 (4th Cir. 2001); *Maghsoudi v. INS*, 181 F.3d 8, 14 (1st Cir. 1999). *But see Ali v. Mukasey*, 521 F.3d 737, 743 (7th Cir. 2008), *cert. denied*, \_\_\_ U.S. \_\_\_, 2009 WL 1738655 (June 22, 2009) (authorizing adjudicators to look beyond the record of conviction to underlying conduct). Unpublished opinions suggest the Sixth and Tenth Circuits also follow the majority approach. *See Jaadan v. Gonzales*, 211 Fed. Appx. 422, 426-27 (6th Cir. 2006); *Farrell-Murray v. INS*, 992 F.2d 1222 (10th Cir. 1993).
6. The categorical and modified categorical approaches have been heavily informed by the Supreme Court’s decisions in two criminal sentencing cases: *Taylor v. United States*, 495 U.S. 575 (1990), and *Shepard v. United States*, 544 U.S. 13 (2005) (limiting sentencing judges to prior records of conviction in determining the nature of previous offenses).
7. In addition to these documents, the Ninth Circuit has held in a criminal sentencing case that a State court clerk’s minute order may be used in assessing whether an offense was a crime of violence under the modified categorical approach. *United States v. Snellenberger*, 548 F.3d 699, 701-02 (9th Cir. 2008) (holding that the list of documents the Supreme Court enumerated for this purpose in *Shepard v. United States*, 544 U.S. 13 (2005), “was illustrative [and] documents of equal reliability may also be considered”).
8. *See supra* note 3. The courts in these published cases approve the modified categorical approach with the exception of the Fourth and Eleventh, which appear not to have considered the modified categorical approach in relation to CIMTs.
9. In *Duenas-Alvarez*, the Supreme Court addressed a categorical analysis in the context of an aggravated felony conviction. The alien, who was convicted of a vehicle theft offense, argued that because a person could be liable as an aider or abettor under the statute, the full possibilities of California case law pertaining to aiding and abetting needed to be considered. The alien argued that because California case law permits an aiding or abetting conviction for results that are the “natural and probable consequences” of one’s actions, and not just the intended crime, an alien could commit an act not involving moral turpitude that leads to a conviction under the same statute for aiding or abetting. The Supreme Court found that this extension of logic was insufficient, stating that the alien “must show something *special* about California’s version of the doctrine [of natural and probable consequences]—for example, that California in applying it criminalizes conduct that most other States would not consider ‘theft.’” *Duenas-Alvarez*, 549 U.S. at 191.

*continued on page 11*

# FEDERAL COURT ACTIVITY

## CIRCUIT COURT DECISIONS FOR JUNE 2009

*by John Guendelsberger*

The United States courts of appeals issued 395 decisions in June 2009 in cases appealed from the Board. The courts affirmed the Board in 351 cases and reversed or remanded in 44 for an overall reversal rate of 11.1% compared to last month's 21.5%. The Ninth Circuit issued 26% of the total decisions and 66% of the reversals. There were no reversals from the First, Fourth, Sixth, Seventh and Tenth Circuits.

The chart below provides the results from each circuit for June 2009 based on electronic database reports of published and unpublished decisions.

Circuit	Total	Affirmed	Reversed	%
1st	9	9	0	0.0
2nd	148	142	6	4.1
3rd	29	25	4	13.8
4th	15	15	0	0.0
5th	32	30	2	6.3
6th	15	15	0	0.0
7th	3	3	0	0.0
8th	8	7	1	12.5
9th	102	73	29	28.4
10th	5	5	0	0.0
11th	29	27	2	6.9
<b>All:</b>	<b>395</b>	<b>351</b>	<b>44</b>	<b>11.1</b>

Output in the Ninth Circuit was lower than usual this month (only 102 cases) with reversals in 28.4% of the cases. Eight of the 29 reversals found fault with the credibility determination as a basis for denying asylum. The court reversed the nexus or well-founded fear determination in three cases. Another was remanded for further consideration under the Supreme Court's decision in *Negusie v. Holder*, 129 S. Ct. 1159 (2009) (persecutor bar). Seven decisions denying motions to reopen were remanded for various reasons. Two of these involved requests to apply for asylum based on changed country conditions. Two others were based on ineffective assistance of counsel. The court also reversed in two cases

in which the Immigration Judge had denied requests for continuances. Five reversals involved criminal grounds for removal.

The Second Circuit reversed in six cases. These included four asylum cases involving level of harm for past persecution or well-founded fear of persecution and one adverse credibility determination.

The Third Circuit found fault with the adverse credibility determination in two cases and found insufficient reasoning in a third. In a fourth case, the court remanded for further consideration of whether requisite notice of hearing had been afforded.

The chart below shows the combined numbers for the first 6 months of 2009, arranged by circuit from highest to lowest rate of reversal.

Circuit	Total	Affirmed	Reversed	%
9th	937	755	182	19.4
3rd	143	119	24	16.8
6th	88	79	9	10.2
7th	41	37	4	9.8
8th	40	37	3	7.5
2nd	667	626	41	6.1
10th	163	153	10	6.1
11th	123	117	6	4.9
5th	21	20	1	4.8
1st	39	38	1	2.6
4th	92	91	1	1.1
<b>All:</b>	<b>2355</b>	<b>2073</b>	<b>282</b>	<b>12.0</b>

Last year at this point there were 2262 total decisions and 327 reversals for a 14.5% overall reversal rate.

*John Guendelsberger is Senior Counsel to the Board Chairman and is currently serving as a temporary Board Member.*

## RECENT COURT DECISIONS

### ***First Circuit:***

*Chedid v. Holder*, \_\_\_F.3d \_\_\_, 2009 WL 2100615 (1st Cir. July 17, 2009): The First Circuit denied a petition for review of the Board's denial of a request for reopening based on the respondent's marriage to a United States citizen. The respondent had filed a motion over 1 year earlier, which the Board dismissed because of insufficient evidence. The second motion argued that the time limit for filing should be equitably tolled on account of ineffective assistance of prior counsel in the preparation and filing of the first motion. The court found that the claim of ineffective assistance regarding the first motion did not excuse the respondent's failure to file the second motion within the prescribed period. Because the respondent did not establish due diligence, as evidenced by the gap of over 1 year between the Board's denial of the first motion and the filing of the second motion, the court upheld the Board's denial of the motion as untimely. The court did not decide whether equitable tolling of filing deadlines is available for untimely motions to reopen.

### ***Sixth Circuit:***

*Nguyen v. Holder*, \_\_\_F.3d \_\_\_, 2009 WL 1884362 (6th Cir. July 2, 2009): The Sixth Circuit reversed a ruling that the respondent's California grand theft auto offense constituted a crime of violence under 18 U.S.C. § 16(b) and was thus an aggravated felony. The court noted that the statute under which the respondent was convicted in 1990 defined "grand theft" simply as the taking of property above a certain value from another, but it did not include the use of physical force as an element. The court further concluded that the offense of auto theft is not understood by nature to entail a meaningful risk that force will be used.

### ***Seventh Circuit:***

*Hassan v. Holder*, \_\_\_F.3d \_\_\_, 2009 WL 1885468 (7th Cir. July 2, 2009): The Seventh Circuit affirmed the denial of the Ethiopian petitioner's applications for asylum, withholding of removal, and protection under the CAT. The petitioner, an ethnic Oromo, alleged that his father was killed in 1986 by the Ethiopian military. The petitioner subsequently left the country. However, he returned to Ethiopia to visit a dying relative and was shot at, and his cousin killed, at the relative's funeral. The Immigration Judge denied the applications, finding that the petitioner was not credible and, alternatively, that he did not establish persecution. The court first

affirmed the adverse credibility finding, which was based on "four events that [the petitioner] described during the hearing but omitted from his application." The court stated that "[t]hese events do not directly contradict [the petitioner's] written application and are arguably not central to his asylum claim," but that "the IJ could properly rely on these material omissions to discredit [the petitioner's] testimony." The court further reasoned that the petitioner's "travel through several countries prior to arriving in the United States," constituted "one of several 'relevant factors' that the agency could consider in finding [the petitioner's] testimony incredible." Second, the court affirmed the finding that the petitioner failed to establish persecution. The court stated that "[n]o evidence links the shooting to any political views held by [the petitioner and his cousin] or imputed to them based on the [Oromo Liberation Front] activities of their long-deceased fathers." In addition, "the soldiers' isolated shooting at unidentified suspects is distinct from the recurring [acts of mistreatment] of political opponents that typically sustain allegations of past persecution." Regarding future persecution, the court ruled that the petitioner did not establish that the Ethiopian government knew of his father's political views or attributed them to the petitioner. Finally, the court stated that "the general treatment of Oromos, who make up approximately 40% of the Ethiopian population, does not alone establish a well-founded fear of persecution."

*Kedjouti v. Holder*, \_\_\_F.3d \_\_\_, 2009 WL 1956341 (7th Cir. July 9, 2009): The Seventh Circuit dismissed the respondent's petition for review of a decision denying his application for withholding of removal from Algeria, which was based on his fear of being targeted by Islamic terrorists there. The respondent stated that he completed his mandatory 2 years of military service in Algeria. He claimed that the terrorists view present and former military conscripts as allies of the Algerian Government and thus consider them to be enemies. Although the respondent provided expert testimony that such present and former conscripts run a "fairly high risk" of being killed by the terrorists, the expert's estimate that perhaps 300 such conscripts were killed in a year, out of a total number of 60,000 current (and many more former) military members, failed to compel the conclusion that it was more likely than not that the respondent would face persecution.

### ***Eighth Circuit:***

*Mambwe v. Holder*, \_\_\_F.3d \_\_\_, 2009 WL 2045687 (8th Cir. July 16, 2009): The Eighth Circuit upheld the

decision denying the Angolan petitioner's applications for asylum, withholding of removal, and CAT protection. The Immigration Judge found that the respondent had suffered past persecution during that country's civil war but determined that the end of the war in 2002 constituted fundamentally changed circumstances sufficient to rebut her fear of future persecution. The Immigration Judge further found that the petitioner was ineligible for asylum based on two other incidents of past mistreatment (a 1991 rape by "boys" from a refugee camp, and a 1997 attack and kidnaping by UNITA soldiers) as these incidents both lacked a nexus to a protected ground. In denying the petition for review, the court affirmed the finding that the end of the civil war constituted changed circumstances rebutting a fear of future persecution. With respect to the rape and the kidnaping, the court held that the record did not compel a finding of a nexus. Regarding the kidnaping, the court rejected the respondent's argument that a political motive could be presumed from the nature of the UNITA attack, with the court stating there was "no shortage of alternative explanations . . . including simple lawlessness and base criminality." Finally, the court rejected the petitioner's argument that "she was 'entitled' to humanitarian relief based on the severity of past persecution that she suffered."

***Ninth Circuit:***

*Popa v. Holder*, \_\_\_F.3d \_\_\_, 2009 WL 1911603 (9th Cir. July 6, 2009): The Ninth Circuit dismissed a challenge to the Government's "two-step process" of first sending a Notice to Appear ("NTA") indicating that the date and time of hearing will be provided at a later time, and subsequently sending the actual notice of hearing. The respondent received the NTA but, prior to receiving the notice of hearing, changed her address without notifying the Immigration Court, after which she failed to appear at her scheduled hearing. The court rejected the respondent's argument on appeal that the NTA was statutorily defective because it failed to state the time and date of hearing. The court further rejected the respondent's assertion that the statement in the NTA requiring an alien to inform the Immigration Court of a change of address was confusing. The court concluded that the document did not state that the respondent could only notify the Government of a change of address through form EOIR-33, which would be provided in person at a hearing. Otherwise, according to the court, any alien could avoid deportation by failing to appear at a hearing where an EOIR-33 could be provided. The court finally held that the in absentia

order entered against the respondent did not violate due process.

*Carrillo-Jaime v. Holder*, \_\_\_F.3d \_\_\_, 2009 WL 2032259 (9th Cir. July 15, 2009): The court held that the California crime of owning or operating a "chop shop" was not categorically a theft offense constituting an aggravated felony under section 101(a)(43)(G) of the Act. The court reached this conclusion by determining that California statute defines "theft" to include theft "by any false or fraudulent representation or pretense." The court noted that an aggravated felony theft offense must include the taking of property without the owner's consent and concluded that this category of theft failed to satisfy that requirement.

**BIA PRECEDENT DECISIONS**

**I**n *Matter of Werner*, 25 I&N Dec. 45 (BIA 2009), the Board addressed the jurisdiction of Immigration Judges over bond proceedings for aliens admitted to the United States under the Visa Waiver Program. In this case, the applicant was placed in asylum-only proceedings and sought a custody redetermination hearing. The Immigration Judge found that he did not have jurisdiction, reasoning that the Board's decision in *Matter of Gallardo*, 21 I&N Dec. 210 (BIA 1996), was superseded by regulations. The Board agreed. In *Matter of Gallardo*, the Board found that an alien in deportation proceedings who was admitted pursuant to the Visa Waiver Program and had applied for asylum could request a bond redetermination hearing before an Immigration Judge. However, the regulations now limit an Immigration Judge's authority to redetermine bond to only those cases involving aliens against whom an arrest warrant has been issued in conjunction with the service of the Notice to Appear, with some additional circumstances not relevant here. 8 C.F.R. § 1236.1(d) (2009). The applicant in *Matter of Werner*, on the other hand, was not placed in removal proceedings but was referred to an Immigration Judge with a Notice of Referral (Form I-863). Asylum-only proceedings are limited to adjudication of asylum applications, and an Immigration Judge may not consider any other issues. 8 C.F.R. § 1208.2(c)(3). Lastly, the statutory authority for the applicant's detention is contained in section 217(c)(2)(E) of the Immigration and Nationality Act, 8 U.S.C. § 1187(c)(2)(E), not section 236 of the Act, 8 U.S.C. § 1226. Section 217(c)(2)(E) gives only the Secretary of Homeland Security authority over aliens admitted pursuant to the Visa Waiver Program.

The Board held in *Matter of Lopez-Aldana*, 25 I&N Dec. 49 (BIA 2009), that an applicant for Temporary Protected Status (“TPS”) may seek de novo review by an Immigration Judge in removal proceedings, regardless of whether all appeal rights before the Department of Homeland Security (“DHS”) have been exhausted. In this case, the respondent applied for TPS with the DHS on several occasions, was denied, but did not appeal the denial with the Administrative Appeals Unit (“AAU”). The DHS initiated removal proceedings and, at the hearing before an Immigration Judge, the respondent sought review of his application for TPS. The Board’s decision in *Matter of Barrientos*, 24 I&N Dec. 100 (BIA 2007), held that the regulations provide de novo review of eligibility for TPS in removal proceedings, even if an appeal has previously been denied by the AAU. The Board clarified that this decision did not intend to limit an Immigration Judge’s jurisdiction to circumstances in which an alien has exhausted all internal administrative appeal rights with the DHS. Neither the regulations nor the statute require the exhaustion of internal DHS appeal procedures. The Board found further support for its determination in 8 C.F.R. §§ 244.18(b) and 1244.18(b), which provide that an alien has a right to a de novo hearing on a TPS application before an Immigration Judge, and if an alien is placed in removal proceedings while an appeal before the AAU is pending, the AAU appeal must be dismissed. This supports the conclusion that since the respondent’s application for TPS was adjudicated and denied by the DHS, he may assert his right to review of his application before the Immigration Judge, even though he did not appeal to the AAU.

In *Matter of Lujan-Quintana*, 25 I&N Dec. 53 (BIA 2009), the Board found that it lacks jurisdiction to review an appeal by the DHS of an Immigration Judge’s decision vacating an expedited removal order in a claimed status review proceeding. The respondent was ordered removed by an immigration officer in expedited removal proceedings under section 235(b)(1) of the Act, 8 U.S.C. § 1225(b)(1). The respondent made a claim of United States citizenship, and the removal order was referred to an Immigration Judge for claimed status review. The Immigration Judge concluded that the respondent met his burden of establishing United States citizenship, and vacated the expedited removal order. The DHS appealed.

The Board found that administrative review in the context of expedited removal proceedings is circumscribed by statute and regulations. Section 235(b)(1)(C) of the Act; 8 C.F.R. §§ 1235.3(b)(2)(ii), (5)(iv), (7). The regulations

specify that if an expedited removal order is referred to an Immigration Judge for review and the Immigration Judge affirms the order, there is no appeal. If the Immigration Judge vacates the expedited removal order and terminates proceedings, as in this case, the DHS may initiate removal proceedings, except if the person is determined to be a United States citizen in removal proceedings. 8 C.F.R. § 1235.3(b)(5)(iv). The Board’s appellate jurisdiction is set forth in 8 C.F.R. § 1003.1(b). This regulation contains no provision giving the Board jurisdiction in this situation. The DHS argued that the omission in 8 C.F.R. § 1235.3(b)(5)(iv) of an explicit bar to its appeal of a decision adverse to the DHS in a claimed status review hearing indicates an intent by the Attorney General to permit such appeals. The Board disagreed, finding that the absence of a bar does not create jurisdiction to consider appeals in claimed status review proceedings. The Board noted that expedited removal is not designed for the adjudication of contested issues of removability, and the DHS can exercise its prosecutorial discretion to place an alien in removal proceedings, including when citizenship is disputed.

In *Matter of Bulnes*, 25 I&N Dec. 57 (BIA 2009), the Board found that an Immigration Judge has jurisdiction to consider a motion to reopen seeking rescission of an in absentia deportation order for lack of notice notwithstanding the alien’s departure from the United States. In this case, the respondent entered the United States without inspection on or about July 28, 1996. She was personally served with an Order to Show Cause in August 1996. In June 1998, she was ordered deported in absentia after failing to appear for her scheduled hearing. On December 7, 2007, she filed a motion to reopen with the Immigration Judge, arguing that she lacked proper notice of the June 1998 deportation hearing. The Immigration Judge denied the motion on January 17, 2008, finding that the in absentia deportation order was executed by the respondent’s departure from and re-entry to the United States subsequent to June 1998. The respondent filed a timely motion for reconsideration. The Immigration Judge denied the motion and the respondent appealed.

The Board first noted that it has long been held that an alien’s departure from the United States while under an outstanding order of deportation has the effect of executing the order. Section 101(g) of the Act, 8 U.S.C. § 1101(g); *Matter of Okoh*, 20 I&N Dec. 864 (BIA 1994). Generally such a departure precludes an Immigration Judge from reopening proceedings. However, this jurisdictional bar presupposes the existence of an outstanding order

of deportation, and an order does not so qualify if it was issued in a proceeding of which the alien did not properly receive notice. An in absentia deportation order issued in proceedings of which the respondent had no notice is voidable from inception, and becomes a legal nullity upon its rescission. Furthermore, the regulatory phrase permitting rescission of an order “at any time” is broad. 8 C.F.R. § 1003.23(b)(4)(iii)(A)(2). As an Immigration Judge has authority to consider whether he has jurisdiction, the Immigration Judge must, in this context, first consider whether an order of deportation existed at the time of departure. The Board concluded that “[a]pplying the jurisdictional bar to reopening in a case involving an inoperative in absentia deportation order would give that order greater force than it is entitled to by law and would, as a practical matter, impose a limitation on motions to rescind that is incompatible with the broad language of 8 C.F.R. § 1003.23(b)(4)(iii)(A)(2).” *Matter of Bulnes*, 25 I&N Dec. at 59-60. The case was remanded to permit further factfinding on when the respondent departed.

In *Matter of Lamus*, 25 I&N Dec. 61 (BIA 2009), the Board addressed whether a motion to reopen to apply for adjustment of status based on a marriage entered into after the commencement of removal proceedings could be denied solely because of the fact that the DHS opposed the motion, without consideration of the merits of the DHS opposition or other evidence. In *Matter of Velarde*, 23 I&N Dec. 253 (BIA 2002), the Board found that a motion to reopen in the circumstances described above could be granted notwithstanding the pendency of an unadjudicated visa petition filed on the alien’s behalf where five factors were met. The fifth factor was that the Government either does not oppose the motion or bases its opposition solely on *Matter of Arthur*, 20 I&N Dec. 475 (BIA 1992) (which had been superseded by *Matter of Velarde*). The respondent argued that the fifth factor was never intended to be dispositive. The Board noted that it has been applied in this way in some cases, and the courts of appeals have gone both ways on the question. Regardless of how the decision should have been read, the Board held that the fifth factor set forth in *Matter of Velarde* does not grant the DHS “veto” power over an otherwise approvable *Velarde* motion. The Board stated that the DHS’s arguments advanced in opposition to the motion should be considered in deciding the motion, but they should not preclude the Immigration Judge or the Board from exercising “independent judgment and discretion.” 8 C.F.R. § 1003.1(d)(1)(ii). In this case, the Immigration Judge denied the respondent’s motion to reopen to apply for adjustment of status solely based on

DHS’s opposition, and did not address the respondent’s evidence of the bona fides of his marriage or the merits of the DHS opposition. The Board vacated the Immigration Judge’s decision and remanded for further consideration of the respondent’s motion.

## REGULATORY UPDATE

**74 Fed. Reg. 31,788**

DEPARTMENT OF STATE

### **In the Matter of the Designation of Kata’ib Hizballah (and Other Aliases) as a Foreign Terrorist Organization Pursuant to Section 219 of the Immigration and Nationality Act, as Amended**

Based upon a review of the Administrative Record assembled in this matter, and in consultation with the Attorney General and the Secretary of the Treasury, I conclude that there is a sufficient factual basis to find that the relevant circumstances described in section 219 of the Immigration and Nationality Act, as amended (hereinafter “INA”) (8 U.S.C. 1189), exist with respect to Kata’ib Hizballah (and other aliases). Therefore, I hereby designate that organization and its aliases as a foreign terrorist organization pursuant to section 219 of the INA. This determination shall be published in the Federal Register.

Dated: June 24 2009.

James Steinberg,

Deputy Secretary of State, Department of State.

**74 Fed. Reg. 37,043**

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

### **Extension of the Designation of Somalia for Temporary Protected Status and Automatic Extension of Employment Authorization Documentation for Somalian TPS Beneficiaries**

ACTION: Notice.

SUMMARY: This Notice announces that the Secretary of Homeland Security has extended the designation of Somalia for temporary protected status (TPS) for 18 months, from its current expiration date of September 17, 2009 through March 17, 2011. This Notice also sets forth procedures necessary for nationals of Somalia (or aliens having no nationality who last habitually resided in Somalia) with TPS to re-register with U.S. Citizenship and

Immigration Services (USCIS). Re-registration is limited to persons who have previously registered for TPS under the designation of Somalia and whose applications have been granted by or remain pending with USCIS. Certain nationals of Somalia (or aliens having no nationality who last habitually resided in Somalia) who have not previously applied to USCIS for TPS may be eligible to apply under the late initial registration provisions. Given the timeframes involved with processing TPS re-registration applications, the Department of Homeland Security (DHS) recognizes the possibility that all re-registrants may not receive new EADs until after their current EADs expire on September 17, 2009. Accordingly, this Notice automatically extends the validity of EADs issued under the TPS designation of Somalia for 6 months, through March 17, 2010, and explains how TPS beneficiaries and their employers may determine which EADs are automatically extended.

**DATES:** The extension of the TPS designation of Somalia is effective September 18, 2009, and will remain in effect through March 17, 2011. The 60-day re-registration period begins July 27, 2009, and will remain in effect until September 25, 2009.

---

---

### **Moral Turpitude** *continued*

10. For an example of an analysis based on a hypothetical, see, e.g., *Partyka*, 417 F.3d at 414 (suggesting that one could be convicted of the ominous sounding “negligent assault with a deadly weapon on a law enforcement officer” by negligently “target-practicing in an authorized area, while uniformed police officers conduct an investigation nearby”).

11. See *Nicanor-Romero v. Mukasey*, 523 F.3d 992, 1004-07 (9th Cir. 2008) (applying the “realistic probability” test and discussing an alien’s burden under the test), *overruled on other grounds*, *Marmolejo-Campos*, 558 F.3d 903.

12. For an interesting discussion of the application of the standard from an immigration practitioner’s point of view, see Norton Tooby & Dan Kesselbrenner, *Living Under Silva-Trevino* 10-12 (2009), available at <http://www.nationalimmigrationproject.org/Living%20Under%20Silva-Trevino%20final.pdf> (suggesting, for example, that practitioners incorporate into the record of conviction a pleading to a specific scienter, such as a temporary taking for some theft statutes).

13. *Partyka*, 417 F.3d at 409.

14. See, e.g., *Jordan v. De George*, 341 U.S. 223, 234 (1951) (Jackson, J., dissenting) (“If we go to the dictionaries, the last resort of the baffled judge, we learn little except that the expression is redundant, for turpitude alone means moral wickedness or depravity and moral turpitude seems to mean little more than morally immoral.”); see also *Ali*, 521 F.3d at 739 (“[M]oral turpitude’ is a notoriously plastic term—one so ambulatory that some Justices have thought it unconstitutionally vague. Neither the Criminal Code nor the Immigration and Nationality Act supplies a definition.” (citation omitted)).

15. The Board has also defined moral turpitude “as an act which is per se morally reprehensible and intrinsically wrong, or malum in se, so it is the nature of the act itself and not the statutory prohibition of it which renders a crime one of moral turpitude.” *Matter of Franklin*, 20 I&N Dec. 867, 868 (BIA 1994); see also *Rodriguez-Castro v. Gonzales*, 427 F.3d 316, 320 (5th Cir. 2005).

16. The Board has found that criminally reckless conduct can involve moral turpitude. See *Matter of Medina*, 15 I&N Dec. 611 (BIA 1976). Citing to *Medina*, the Third Circuit stated that “serious crimes committed recklessly” involve moral turpitude if the culpable acts are done “with conscious disregard of a substantial and unjustifiable risk that serious injury or death would follow.” *Partyka*, 417 F.3d at 414. However, the Third Circuit and the Board have noted that reckless crimes, at least in the area of assault, are crimes involving moral turpitude only when an act is deliberately committed and coupled with an aggravating factor. *Id.* at 415; see also *Matter of Solon*, 24 I&N Dec. at 240-43.

17. Memorandum of Law of *Amici Curiae* American Immigration Lawyers Association et al. (Dec. 5, 2008), AILA InfoNet Doc. No. 08120961, available at <http://www.aila.org/Content/default.aspx?docid=27391>.

18. Compare *Matter of Grijalva*, 19 I&N Dec. 713 (BIA 1988) (holding that a police report is admissible in cases involving discretionary relief from deportation), *Matter of Teixeira*, 21 I&N Dec. 316, 321 (BIA 1996) (holding that while a police report can be admitted into evidence to determine discretionary relief, it should not be admissible “where the Act mandates a focuses on a criminal conviction, rather than on an alien’s conduct”), and *Rojas-Garcia v. Ashcroft*, 339 F.3d 814, 823-24 (9th Cir. 2003) (holding that hearsay testimony from police officers regarding an undercover drug investigation was admissible), with *Matter of Sanudo*, 23 I&N Dec. 968, 974-75 (BIA 2006) (holding that a police report is inadmissible during a categorical examination unless specifically incorporated into the record of conviction).

#### **EOIR Immigration Law Advisor**

**David L. Neal, Acting Chairman**  
*Board of Immigration Appeals*

**Brian M. O’Leary, Chief Immigration Judge**  
*Office of the Chief Immigration Judge*

**Karen L. Drumond, Librarian**  
*EOIR Law Library and Immigration Research Center*

**Jack H. Weil, Acting Assistant Chief Immigration Judge**  
*Office of the Chief Immigration Judge*

**Carolyn A. Elliot, Senior Legal Advisor**  
*Board of Immigration Appeals*

**Emmett D. Soper, Attorney Advisor**  
*Office of the Chief Immigration Judge*

**Layout by EOIR Law Library**